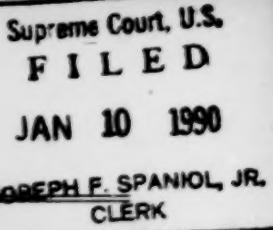


No. 89-950



In The
Supreme Court of the United States
October Term, 1989

UNITED TRANSPORTATION UNION,

Petitioner,

vs.

JOHN H. BLANKENBAKER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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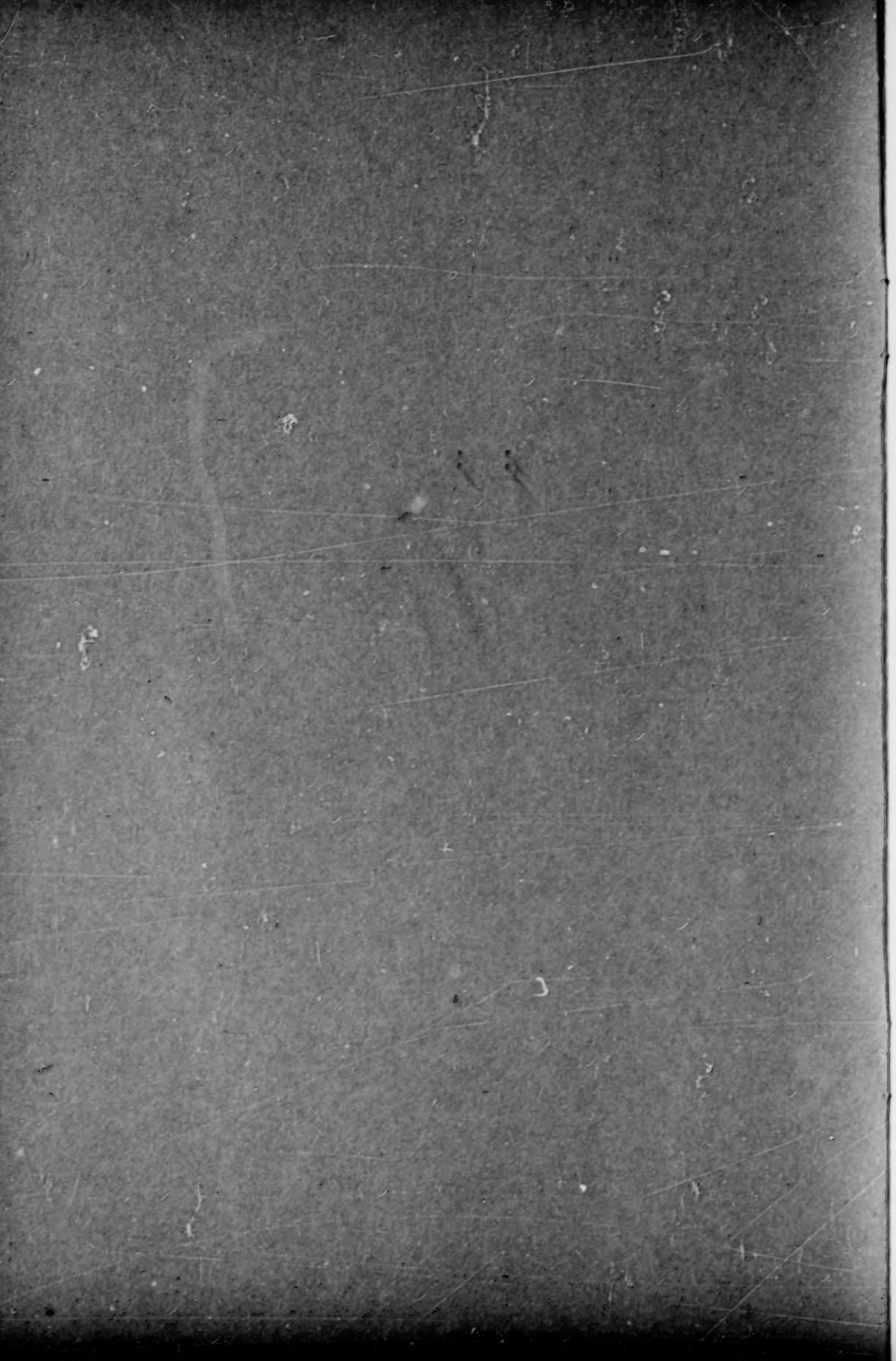
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QUESTION PRESENTED

Should this Court review an interlocutory decree of the court of appeals remanding this case to the trial court for reconsideration of the facts and law upon which the trial court made its determination that petitioner's seniority system was bona fide under § 703(h) of the Civil Rights Act of 1964?

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STATEMENT OF THE CASE

The petitioner's seniority system has already been the subject of intense scrutiny by the court below in related litigation that involved claims of discrimination under Title VII against petitioner and the Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") brought by a class of black train porters who were fellow crew members with respondent chair car attendants on Santa Fe passenger trains. *Sears v. Atchison, Topeka & Santa Fe Railway*, 645 F.2d 1365 (10th Cir. 1981) (*Sears I*); *Sears v.*

Atchison, Topeka & Santa Fe Railway, 749 F.2d 1451 (10th Cir. 1984) (*Sears II*). In *Sears I*, for example, the court below summarized the intended effect of petitioner's seniority system by stating that "racial discrimination was the standard operating procedure for Santa Fe and [petitioner] and its predecessors for nearly a century, carrying over past the effective date of Title VII through operation of the seniority system." *Sears I*, 645 F.2d at 1370. In connection with certiorari proceedings from those decisions, this Court has also examined the very seniority system that is now again before the Court. *United Transportation Union v. Sears*, cert. denied, 456 U.S. 964 (1982) (*Sears I*); *United Transportation Union v. Sears*, cert. denied, 471 U.S. 1099 (1985) (*Sears II*). This Court is also familiar with the blatant discrimination that petitioner has practiced on other railways. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952).

The court below has remanded this case to the trial court in view of perceived shortcomings in the trial court's examination of the record and applicable law. The court below held:

We reverse and remand the district court's determination that the seniority system at issue was bona fide because we conclude the court made legal errors both in its application of the *Stockham Valves*¹¹ factors and the failure to consider relevant evidence.

(Petitioner's Brief at A-20 [878 F.2d 1235 at 1244])

¹¹ *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978).

In apparent recognition of the fact that this is a truly interlocutory appeal with factual issues still unresolved, petitioner in its brief has properly refrained from presenting a detailed account of the factual circumstances surrounding petitioner's seniority system as it relates to respondents' claims of discrimination. For the same reason, respondents will also refrain from presenting to this Court their own rendition of the facts.

REASONS FOR DENYING THE WRIT

Petitioner urges this Court to review an interlocutory order of remand in a case where the facts and the application of the law to those facts are yet to be determined. This Court in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), announced that certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. (citations omitted). And, except in extraordinary cases, the writ is not issued until the final decree." In fact, the interlocutory nature of the case "of itself alone furnishes sufficient ground for the denial of the application." *Id.*

This case is a fitting example of the reason for the rule that, except in extraordinary cases, this Court will not accept jurisdiction of a case from an interlocutory order. This case involves the issue of whether defendant's seniority system is bona fide under § 703(h) of the Civil Rights Act of 1964. Resolution of this case requires an

examination of the "totality of circumstances" surrounding that seniority system. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 345 (1977).

The court below remanded the case to the trial court for a re-examination of those factual circumstances and the applicable law in order for the trial court to reconsider its previous determination that petitioner's seniority system is bona fide. However, all of petitioner's Questions Presented are premised on the contrary assumption that the lower courts have already concluded that petitioner's seniority system is not bona fide as applied to respondents. No lower court has ever reached such a conclusion. This Court's acceptance of certiorari at this juncture would therefore require it to delve into the extensive record (as the court below has already instructed the trial court to do on remand) and then reach a new conclusion based upon the facts revealed in that record which would be consistent with petitioner's implicit assumption (contrary to its own position) that its seniority system is not bona fide. Only then could this Court be in a position to address petitioner's Questions Presented. It is apparent that this case is not ripe for review.² See *Brotherhood of Locomotive Firemen and Engine-men v. Bangor & Aroostook Railroad*, 389 U.S. 327 (1967).

2 By declining to discuss petitioner's Questions Presented and petitioner's legal authorities as not ripe for consideration, respondents do not wish to imply in any way that petitioner's contentions are meritorious or are worthy of the exercise of this Court's certiorari jurisdiction. Respondents' response, however, should wait for a later day after the factual and legal issues are conclusively addressed by the lower courts. Compare *Frisby v. Schultz*, 487 U.S. ___, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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